80-1786

No._____

Office-Supreme Court, U.S.
FILED
MAY 26 1981
ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

PAT BROWN, JR.

Petitioner,

VERSUS

STATE OF LOUISIANA THROUGH THE DEPARTMENT OF PUBLIC SAFETY, DIVISION OF STATE POLICE

Respondent.

On Petition for a Writ of Certiorari to The Supreme Court of Louisiana

RESPONDENT'S BRIEF IN OPPOSITION

JAMES C. DIXON
Attorney of Record
State of Louisiana
thru Department of
Public Safety
P. O. Box 66614
Baton Rouge, Louisiana 70896
(504) 925-6103

QUESTIONS PRESENTED

1. Whether the State of Louisiana, through the reasonable exercise of its police power can declare *gambling slot machines* to be contraband, and provide for their summary seizure and destruction.

TABLE OF CONTENTS

PAGE

Questions Presented i
Statement of the Case 1
Reasons for Denying Writs 2
Conclusion 9
Certificate of Service 11
Appendix A 12

TABLE OF AUTHORITIES

PAGE

Cases

State of Louisiana v. Ricks 41 So.2d 232 (La., 1949) 3
Gascon v. State of Louisiana 263 So.2d 81 (La. App. 1st Cir., 1972) 4
State of Louisiana v. Madere 352 So.2d 366 (La., 1977) 5
Lawton v. Steele 152 U.S. 133, 14 S.Ct. 499, 38 L.Ed. 385 9

Statutes

LSA-R.S. 15.31 2

Louisiana Constitution of 1921

Article 19, Section 8 3

PRECEDING PAGE WAS BLANK

No._____

In the
Supreme Court of the United States

OCTOBER TERM, 1980

PAT BROWN, JR.

Petitioner,

VERSUS

STATE OF LOUISIANA THROUGH THE DEPARTMENT OF PUBLIC SAFETY, DIVISION OF STATE POLICE

Respondent.

On Petition for a Writ of Certiorari to The Supreme Court of Louisiana

---

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

On July 17, 1979, detectives of the Louisiana State Police executed a valid search warrant issued by the Nineteenth Judicial District Court. Pursuant thereto, they entered the premises of petitioner Pat S. Brown, Jr. and confiscated therefrom one (1) slot machine. The search warrant was issued pursuant to LSA-R.S. 15:31 which mandates the summary confiscation and destruction of all gambling slot machines.

Pat Brown petitioned the Nineteenth Judicial District Court for injunctive relief to prevent the destruction of the gambling slot machine, and gain instead, its return. The issue was submitted on written stipulation of facts and legal memoranda. The trial court ruled in favor of petitioner ordering the return of the machine. The State of Louisiana took suspensive appeal to the Louisiana First Circuit Court of Appeal. That court affirmed the decision of the trial court and further held LSA-R.S. 15:31 to be unconstitutional.

Appeal was taken to the Louisiana Supreme Court which reversed the decision of the First Circuit, and sustained the constitutionality of LSA-R.S. 15:31.

REASONS FOR DENYING THE WRITS

Despite petitioner's efforts to inflate this controversy into an issue arising under the United States Constitution, this case involves a rather simple question: Can the State of Louisiana, in the reasonable exercise of its police power, declare that *gambling slot machines* are contraband and order their summary confiscation and destruction?

LSA-R.S. 15:31 reads in pertinent part as follows:

> "A. All law enforcement officers of municipal police forces, sheriff's departments and the division of state police, are hereby authorized and empowered and it is made mandatory and compulsory on their part to confiscate and immediately destroy all *gambling devices* or machines used for gambling that come to their attention.

> B. As used in this Section, the term 'gambling device' means: (1) *any slot machine;* or (2) any machine, mechanical or electronic device of any sort whatsoever with a cash automatic payoff device; or (3) a pinball or other ball machine, mechanical or electronic device equipped with a mechanism to release the number of free games or replays and a mechanism to record the free games or replays so released." (Emphasis added.)

In order to understand the present posture of the statute, its history is important. The Louisiana Constitution of 1921 provided at Article 19, Section 8, "Gambling is a vice and the Legislature shall pass laws to suppress it."

Pursuant thereto, the Louisiana Legislature of 1928 enacted Act 231, Section 1, which read as follows:

> "All officers of the State of Louisiana are hereby authorized and empowered and it is made mandatory and compulsory on their part, to confiscate and immediately destroy all gambling devices known as slot machines that may come to their attention or that they may find in operation."

In 1949, the Louisiana Supreme Court had occasion to consider the propriety of the provision in light of constitutional guarantees. In *State of Louisiana v. Ricks*, 41 So.2d 232 (La., 1949) the Louisiana Supreme Court sustained the statute against constitutional attack, liberally citing and quoting from decisions of the United States Supreme Court.

In 1966, LSA-R.S. 15:31 was amended by Act 311 to read as follows:

"31. Confiscation and destruction of gambling devices; exceptions

A. All officers of the State of Louisiana are hereby authorized and empowered and it is made mandatory and compulsory on their part to confiscate and immediately destroy all gambling devices or machines used for gambling that may come to their attention *and that they may find in operation.* The ownership of a federal gambling stamp for the machine or device shall be absolute proof of its use for purposes of gambling, except as set forth in Subsection B of this Section, and neither the State of Louisiana nor any subdivision, agency, agent, or enforcement officer shall be liable civilly or criminally for the destruction of any gambling device or gambling machine for which a federal gambling stamp has been issued. (Emphasis added.)

B. This Section shall not apply to any games, machines, or other devices, where there is no cash automatic payout and where there is an element of skill involved in the playing, including specifically coin-operated bowling games, shuffle alleys, pinball games, mechanical baseball games, electronic ray guns, mechanical guns, digger type machines, iron claws, and all similar types of coin-operated amusement games, as licensed under Subsections A,B,C, and E of R.S. 47:375."

Thereafter, the Louisiana First Circuit Court of Appeal had occasion to construe the amended version in the case of *Gascon v. State of Louisiana thru Department of Public Safety* 263 So.2d 81, (La. App. 1st Cir., 1972) and held that in order for the police to exercise

their confiscatory power, the gambling slot machine must be in *actual operation.*

Less than one month after this decision was rendered, LSA-R.S. 15:31 was amended to its present form omitting the phrase, ". . . and that they may find in operation." However, the issue of actual use was not finally resolved until the Louisiana Supreme Court decided the case of *State of Louisiana v. Madere* 352 So.2d 366 (La., 1977), wherein the court held that it was the intent of the Legislature, through the state's police power, to declare gambling slot machines to be contraband, insusceptible of ownership, and provide for their summary confiscation and destruction *irrespective of actual use for gambling.*

In petitioner's efforts to enlarge this case into one of federal constitutional proportions, much is made of the fact that petitioner's machine was not in actual use for gambling. The point is constitutionally irrelevant.

Contraband narcotics need not be in actual use in order to fall within the state's power to confiscate and destroy that which is dangerous to society. Such a requirement would be ludicrous. The danger lies not only in the actual use, but the potential for actual use as well, and while petitioner's gambling slot machine admittedly was not in actual use, it is a completely operable gambling slot machine, but for a missing lock on its coin box. In other words, for the mere cost of a few dollars to install a simple lock on the coin box, the device could be used for gambling.

At the trial court, the issue was submitted upon written stipulation of fact, an *accurate* copy of which can be found at Appendix A. Therein, both parties stipulated to the fact that the machine in question was and is *operable*, and no amount of rhetorical slight of hand on the part of petitioner ought to deceive this court. Let it be clear! We are *not* dealing with a device that "could not be used for gambling" as petitioner repeatedly asserts in application. At issue is a fully operable gambling slot machine that is merely missing the lock from the coin box. In fact, if the device were placed against a wall, which is the customary means of implementation, a user would not know that the coin box was unlocked. Thus, let us not be deceived. At issue is a *gambling slot machine* of precisely the type long proscribed in Louisiana as dangerous contraband insusceptible of ownership and which cannot be subject to the property rights protected by both the United States and Louisiana Constitutions.

Petitioner asserts at page 5 that the state stipulated that the device was "the personal property" of Pat Brown. That simply is not correct. At paragraph 4 of the *Written Stipulation of Facts* (Appendix A), the state merely stipulated that the slot machine was in the possession of petitioner Pat S. Brown.

Petitioner relies heavily upon the legal distinction between contraband per se and derivative contraband, the former being those things insusceptible of lawful use, while the latter includes those things susceptible of lawful use but which are put to unlawful purposes. For example, motor vehicles are things, the fundamental

purpose of which is lawful. However, if a motor vehicle is used by or with the consent of the owner to transport illegal narcotics, it becomes *derivative contraband*. On the other hand, the illegal narcotics being transported is *contraband per se*. Notice and hearing are required by due process with regard to the motor vehicle. However none is required with regard to the narcotics. The legal distinction lies in the fact that the fundamental purpose of motor vehicles is lawful, while the illegal narcotics are things the fundamental purpose of which is unlawful. Notice that the distinction does *not* lie in whether a thing is *susceptible of lawful use*. A bag of heroin can be lawfully used as a paperweight, but the potential for use as a paperweight does not offset the dangers associated with its *fundamental purpose*. Therefore, the appropriate point of view for this court is toward the *fundamental purpose of a gambling slot machine*. Clearly, it was manufactured as a *gambling device*. Clearly, its principle purpose is for use as a *gambling device*. Gambling is unlawful. Therefore the gambling slot machine here at issue is *not* derivative contraband, but contraband per se and is within the state's police power to summarily seize and destroy.

LSA-R.S. 15:31 is thrust upon this court by petitioner as unconstitutionally vague and overbroad, because it "authorizes the seizure and destruction of any machine operable by dropping a coin into a slot such as an ordinary gum machine, or coke machine." Once again, petitioner must resort to rhetorical excess to make a tenuous point.

The statute mandates that police officers confiscate and destroy *gambling devices*. At subsection B, gambling devices are defined, in pertinent part, as any slot machine. Petitioner conveniently extracts the term *slot machine* from its logical and coherent context, and asserts that non-gambling vending machines come within the provisions of the statute.

Nota bene that it is gambling devices that are proscribed by the statute. *Gambling* is risking something of value in order to realize a profit. Therefore, a *gambling device* is, fundamentally, a device whereby one can risk something of value in order to realize a profit.

While some perhaps would contend that there is a certain risk associated with using vending machines, due to mechanical malfunction, they are fundamentally devices of commerce designed and intended to facilitate commercial transactions - *quid pro quo*. One deposits coinage with the expectation and legal right to acquire a product in exchange.

For a *slot machine* to come within the meaning of the statute, it must be a *gambling device*, that is a device whose fundamental purpose and intent is to facilitate the risk of something of value in order to realize a profit. Despite the strained rationale' of petitioner, vending machines simply do not fit the mold; and apparently petitioner is the only one who has mistaken the Legislature's meaning in the fifty years since Act 231 of 1928 went into effect. Not once has a coke or gum machine been mistaken for a "one-armed bandit," and been seized and destroyed to the detriment of a citizen's property

rights. And even in the unimaginable event that such a mistake were made, the citizen's rights could be vindicated by money damages, which is the traditional remedy as pointed out by this court in *Lawton v. Steele* 152 U.S. 133, 14 S.Ct. 499, 38 L.Ed. 385.

CONCLUSION

The manifest legislative intent of LSA-R.S. 15:31 is to proscribe *gambling devices*. The statute defines *gambling device* in pertinent part, as any *slot machine*, and mandates summary confiscation and destruction. Obviously, then, *slot machines* susceptible of use as a *gambling device* are contraband per se. They are *not* derivative contraband given the legislative history and the holding of the Louisiana Supreme Court in *State of Louisiana v. Madere*, supra. In the case at hand, State Police officers acting pursuant to a search warrant seized an admittedly operable *gambling slot machine* of the precise type proscribed by the statute.

Further, the enactment is well within the police power of the state, to declare things which are detrimental to the health, safety and welfare as contraband. Such power, of course is bounded by reasonableness, and for at least fifty years in Louisiana such provisions have not been found wanting. Our highest court, relying upon precedent from this Honorable Court, has consistently sustained such provisions.

Therefore, based upon the foregoing, it is re-

spectfully submitted that the application by petitioner for writ of certiorari be denied.

Respectfully submitted,

JAMES C. DIXON
Attorney of Record
State of Louisiana, through Department of Public Safety
P.O. Box 66614
Baton Rouge, LA 70896
(504) 925-6103

CERTIFICATE OF SERVICE

I hereby certify that three (3) true and correct copies of the foregoing Brief in Opposition to Application for a Writ of Certiorari to the Supreme Court of Louisiana have been served on Carolyn Pratt Perry, counsel of record for Pat S. Brown, petitioner, of the law firm of Franklin, Moore, and Walsh, 501 Louisiana Avenue, P.O. Box 3958, Baton Rouge, Louisiana, 70821, by depositing said copies in the U.S. mail, postage prepaid, this ____ day of May, 1981.

JAMES C. DIXON
Attorney of Record

APPENDIX "A"

NUMBER 226,405—DIVISION "G"
19TH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

PAT S. BROWN, JR.

VERSUS

STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF PUBLIC SAFETY, DIVISION OF THE LOUISIANA STATE POLICE DEPARTMENT

WRITTEN STIPULATION OF FACTS

1.

The State of Louisiana, through the Department of Public Safety, Division of State Police, their officers and agents agree and stipulate that during the pendency of this litigation, whether in the trial or appellate courts, that certain slot machine belonging to Pat S. Brown, Jr. and made the subject of this litigation will not be altered, tampered with or destroyed.

2.

The slot machine in question was an antique slot machine.

3.

The slot machine in question was a one-cent machine, operable only by insertion of a penny, and not operable by insertion of other coins of greater monetary value.

4.

The slot machine in question was in the possession of Pat S. Brown, Jr.

5.

The slot machine in question is and was at the time of seizure operable.

6.

The slot machine in question was not used for gambling purposes.

NOTE: Photographs of machine in question attached.

7.

No criminal charges for gambling have been brought against Pat S. Brown, Jr. arising out of his possession of the antique slot machine in question.

8.

The slot machine coin box where deposited coins are stored does not have a lock, and coins once deposited can be reclaimed by anyone so depositing a penny in the coin slot.

9.

At the time of the seizure the slot machine was located on a bathroom countertop located in the women's restroom of the Pat S. Brown, Jr. Claim Service at 10466 Airline Highway.

10.

The restroom wherein the machine was stored is not generally open to the public.

11.

The search warrant attached hereto is a search warrant under which the State asserted its authority to seize the machine in question.

FRANKLIN, MOORE &
WALSH
501 Louisiana Avenue
Post Office Box 3958
Baton Rouge, Louisiana 70821
Telephone: (504) 383-2608

By: _____
Daniel J. Dziuba
Attorney for Plaintiff

STATE OF LOUISIANA
DEPARTMENT OF
PUBLIC SAFETY
DIVISION OF STATE
POLICE

By: _____
Howard Elliott
Attorney for Defendant